

ITEM 2

SUPPLEMENTAL ANALYSIS

APPEAL OF EXECUTIVE DIRECTOR'S DECISION THAT SECTION 1188.4 OF THE COMMISSION'S REGULATIONS DOES NOT APPLY TO THE RECONSIDERATION OF THE DECISION IN

REGIONAL HOUSING NEEDS DETERMINATION: COUNCILS OF GOVERNMENTS (04-RL-3929-05)

Association of Bay Area Governments, Appellant

As discussed below, staff has considered appellant Association of Bay Area Governments' (ABAG's) March 24, 2005 comments and provides this response. Staff continues to recommend that the appeal be denied.

BACKGROUND

Appellant ABAG argues that California Code of Regulations, title 2, section 1188.4 (hereafter, "section 1188.4"), should apply to the reconsideration of the *Regional Housing Needs Determination: Councils of Governments Decision*. Specifically, ABAG urges that the five-vote requirement in subdivisions (f) and (g)(2) of section 1188.4¹ should apply to afford due process and procedural safeguards.

On March 11, 2005, appellant ABAG submitted a letter to Commission staff appealing the Executive Director's determination that section 1188.4 does not apply to this reconsideration. Staff responded to ABAG on March 16, 2005 that the appeal would appear on the Commission's March 30, 2005 hearing agenda. ABAG's letter appealing the Executive Director's decision and the staff response were posted to the Commission's website on March 17, 2005. Staff posted an analysis of the appeal on the Commission's website on March 18, 2005. ABAG submitted comments on the agenda item on March 24, 2005, to which staff makes this reply.

The appeal is based on California Code of Regulations, title 2, section 1181, subdivision (c), authorizing parties to appeal a decision of the Executive Director.

ANALYSIS

ABAG first cites an Attorney General opinion regarding the Commission's jurisdiction to reconsider its prior final decisions. The Attorney General opined that the Commission has jurisdiction to reconsider prior final decisions, "where the prior decision was contrary to law."² This opinion was issued before the Commission was granted statutory authority to reconsider prior final decisions.

Staff notes that this opinion was put in doubt by the Second District Court of Appeal in *County of San Bernardino v. State of California* ((Oct. 10, 2001, B140704) [nonpub. opn.]),³ a case in

¹ These subdivisions refer to the five-vote requirement to rehear a prior final decision (in subd. (f)) and to change a prior final decision (in subd. (g)(2)).

² 72 Opinions of the California Attorney General 173 (1989) (Exhibit D).

³ Although staff does not rely on an unpublished decision for a point of law, the court's reasoned analysis puts appellant's position in doubt (case attached).

which the county sought reimbursement for costs of care provided to medically indigent adults. The court distinguished the authorities relied on in the opinion from the case at bar, stating:

The authorities relied on in the Attorney General’s opinion, as well as its analysis, do not support or validate the county’s effort to obtain reconsideration of its test claim decision on grounds the law governing the question changed, eight years later, by reason of ...[citation]. [The cases relied on in the opinion] both spoke of an agency’s having exceeded its jurisdiction, or having performed an act beyond its authority or powers. These are far greater departures than an agency’s ruling within its jurisdiction and powers, but not anticipating a clarification of or change in the law several years later. [Court went on to further distinguish the authority on which the attorney general opinion relied.]

ABAG recognizes section 1188.4 (promulgated in 1998) and Government Code section 17559 (reconsideration provision added in 1999) as the authority granted to the Commission to “correct an error of law.” Relying on the attorney general opinion, however, ABAG describes the Commission’s jurisdiction to reconsider a prior final decision as an “implied power to reconsider a prior decision,” or an “implied reconsideration.” ABAG supposes that section 1188.4 applies to these “implied reconsideration” actions.

Staff does not recognize the existence of an “implied power” to reconsider or an “implied reconsideration.” The Commission’s jurisdiction to reconsider a prior final decision comes from statute and regulation (Gov. Code, § 17559, subd. (a) & § 1188.4), or from a court decision, or from the Legislature via a special statute such as S.B. 1102.⁴ ABAG ignores the striking differences among these types of reconsiderations.

For example, reconsiderations based on Commission statutes and regulations (hereafter “17559/1188.4”), as expressly stated in section 1188.4, originate upon request of “any interested party, affected state agency, or commission member...” (§ 1188.4, subd. (b)). Thus, staff finds that section 1188.4 only applies when the reconsideration comes from a “party” (defined as “the test claimant, the Department of Finance, Office of State Controller, or affected state agency.”⁵), or on the motion of a Commissioner (§ 1188.4, subds. (b) & (d)). Also, for a 17559/1188.4 reconsideration to apply, it must be within 30 days of the prior final decision (§ 1188.4, subd. (a)), and the prior final decision cannot have been made before July 1998 (§ 1188.4, subd. (j)).

A legislative or court-ordered reconsideration, on the other hand, cannot be so limited. The Legislature or a reviewing court has power to require the Commission to reconsider its prior final decisions outside the 30-day timeframe of 17559/1188.4. Nor does the Legislature need to rely on a party or a Commissioner to request the reconsideration. Because they are based on requests by the Legislature or a reviewing court, these reconsiderations fall outside the 1188.4 procedures.

Attempting to minimize these differences, appellant ABAG urges that section 1188.4 apply to this reconsideration because of 1188.4’s procedural safeguards and the requirement for due process.

ABAG fails to mention that the Commission has provided procedural safeguards and has complied with due process requirements in reconsidering the *Regional Housing Needs*

⁴ S.B. 1102 (Stats. 2004, ch. 227, effective Aug. 16, 2004), “notwithstanding any other provision of law,” directs the Commission to reconsider the Board of Control’s 1981 final decision on the *Regional Housing Needs* program.

⁵ California Code of Regulations, title 2, section 1181.1, subdivision (m).

Determination decision. Staff has notified parties and interested parties, issued a draft and final staff analyses, and considered initial comments and comments on the draft analysis, all within timeframes that allowed full participation by parties and interested parties (see “Background” under the item 2 staff analysis). The hearing on this item and items 3-4 on the agenda also reveal the prevalence of due process. If there is a requirement for procedural safeguards or due process to be based on a regulation, ABAG makes no reference to it.

ABAG, without citation to authority, also argues that the five-vote requirement to hear a reconsideration (§ 1188.4, subd. (f)), and to overturn a prior final decision (§ 1188.4, subd. (g)(2)), should apply. According to ABAG, “It is untenable for the Commission to now eviscerate those safeguards when the request for reconsideration comes from an entity that is not directly involved in the prior decision.”

Staff disagrees. Section 1188.4, subdivision (a) expressly states that the section does not apply when the court (also not involved in the prior decision) orders the reconsideration. Staff recognizes that the Legislature, as a co-equal branch of government,⁶ also has the power to require reconsiderations without application of the section 1188.4 procedure.

ABAG also criticizes that the portion of the staff analysis that analyzes S.B. 1102’s proviso, “notwithstanding any other provision of law.” ABAG states, “The staff analysis presupposes that any procedure that might impede a rush to overturn the prior decisions of the Commission must be swept aside to accommodate SB 1102.”

Staff disagrees. ABAG ignores the legal citations in the staff analysis that show the Commission cannot (through section 1188.4 or any regulation) limit (or expand) the legislative grant of authority to reconsider the prior decision.⁷ Nor can the Commission ignore the fact that, in complying with S.B. 1102, “rules and regulations [such as § 1188.4] do not have the authority and force of *statutory law* [such as S.B. 1102], and must themselves yield to *statutory law* when in conflict therewith.”⁸ [Emphasis added.]

Finally, ABAG argues that, “there is absolutely no basis for ignoring the five (5) affirmative vote requirement to actually overturn the Commission’s prior decisions.”

Staff finds that the basis for not applying section 1188.4 to a legislative reconsideration, in addition to the reasons already stated, is similar to the basis for 1188.4 not applying to a court-ordered reconsideration. That is, applying it would thwart the legislative intent of S.B. 1102: that the *Regional Housing Needs Determination* be reconsidered in a timely manner⁹ (just as applying § 1188.4 to a court-ordered reconsideration would thwart the judicial intent). Staff does not find convincing ABAG’s arguments to the contrary.

⁶ “Separate powers are divided coequally among the three [branches of government].” *Kollander Const., Inc. v. Superior Court* (2002) 98 Cal.App.4th 304, 311 (case attached).

⁷ A regulation cannot restrict an agency’s statutory power. *City of San Jose v. Department of Health Services* (1998) 66 Cal.App.4th 35, 42 (Exhibit C).

⁸ *City of San Jose v. Department of Health Services*, *supra*, 66 Cal.App.4th 35, 41.

⁹ S.B. 1102 (effective Aug. 16, 2004) included the directive that, “Any changes by the commission shall be deemed effective July 1, 2004.”